IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941.

No. 128
No. 129

BONDHOLDERS COMMITTEE, MARLBOROUGH INVESTMENT COMPANY, FIRST MORTGAGE BONDS, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

MARLBOROUGH HOUSE, INC., a corporation, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

## REPLY BRIEF OF PETITIONERS.

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## REPLY BRIEF OF PETITIONERS.

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Respondent under B pages 9 to 14 has raised a point not made before the Board of Tax Appeals or before the court below.[1]

(a) Issues. Petitioners before the Board of Tax Appeals raised two issues; (1) Depreciation should be on 30 years remaining life of the building instead of 45 years as determined by the Commissioner and (2) the cost of the building

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[1] See Respondent's Brief, p. 9, note 8.

should be $379,045.67 instead of the amount bid at the foreclosure sale. (R. 214 and 17.)

(b) Board Hearing. At the hearing, the applicability of the rule of *Kitselman* and *Neberry* cases was suggested and the Board applied this rule in its decision of November 7, 1939. (R. 43) The Commissioner and the taxpayers filed an agreed recomputation of the taxes February 17, 1940 and the order determining the litigation was entered February 26, 1940. (R. 43)

(c) This Court decided *LaTulle* v. *Scofield*, January 2, 1940, and rehearing was denied January 29, 1940.

(d) The Commissioner sought review May 13, 1940. His Brief in the court below claimed reversal on the application the *LaTulle* case[2] and its reversal of the *Kitselman* case.[3]

(e) The Commissioner did not oppose the Petitioner's Petition to this Court for a Writ of Certiorari but at p. 2 of its memorandum said: "This conclusion (of the Court below that neither Section 113(a)(6) or (a)(7) was avail-

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[2] Commissioner's Brief in court below p. 11. "The decision of the Board proceeds upon the theory that since the stockholder interest in the old corporation had been eliminated by virtue of insolvency and default upon its bonds, the bondholders of such corporation could be treated as occupying the status of stockholders and of the corporation itself, that under this view a statutory reorganization had been effected. * * * The reasoning of the Board is directly contrary to the recent decision of the Supreme Court in La Tulle v. Scofield. * * *" At p. 18. "Only the old corporation (Marlborough Investment Company) and its stockholders had a proprietary interest in the corporation's assets up to the time of the sale through the foreclosure proceedings. As a result of this sale such proprietary interest was severed—all interest of the prior owners was eliminated." At p. 23. "In the instant case it is clear that when the foreclosure sale deprived the Marlborough Investment Company of its assets in 1933, the *stockholders* of that company were entitled to take a loss."

[3] Commissioner's Brief in court below, p. 27. "The position of the Government here, it will be noted, assumes the reversal of the *Kitselman* rule by reason of the *La Tulle* decision."

able to the Petitioners) rests on the view that a transaction which transfers the ownership of an enterprise from its stockholders to its creditors does not provide the continuity of proprietary interest essential to a 'reorganization' under the revenue laws."

(f) Only on January 9, 1942, when Petitioners received the Commission's Brief in this Court were they advised of his new position.

Matters of this sort not made below and made here for the first time cannot and should not be permitted.

> *Burnet* v. *Commonwealth Imp. Co.*, 287 U. S. 415, 418.
> *Helvering* v. *Tex-Penna. Oil Co.*, 300 U. S. 481, 497.
> *Helvering* v. *Wood*, 309 U. S. 344.

The findings of fact made by the Board of Tax Appeals do not bear out the statements on page 9 of Respondent's Brief. The Board found: "The basis for depreciation in the property in the hands of the bondholders' committee and Marlborough House, Inc., was the same as in the hands of the Marlborough Investment Co., less depreciation already taken by the latter." (R. 35)[4]

It may be argued that the findings also recite a conveyance from record owners (R. 31) but there is nothing in the findings to support the assertion at page 9 of Respondent's Brief that neither Marlborough Investment Co. or its stockholders "any longer had any interest in the assets." The foregoing finding is inconsistent therewith. In addition, to carry out the plan of reorganization the Marlborough Investment Co. approved the decree of foreclosure (R. 154 at 163), the foreclosure sale went forward and was confirmed to the Committee. The Certificate of Purchase was assigned to Marlborough House, Inc., and the Sheriff's deed was issued directly to it. (Board's Findings p. 33)

[4] The Commissioner argued to the Board that the foreclosure sale severed the interest of Marlborough Investment Co. and its stockholders and so invited this finding which is more than an ultimate conclusion.

The statute confers the duty and power to the Board alone to find facts. Neither this Court nor the Circuit Court of Appeals has power to comb the evidence and find or re-find facts.

*Helvering* v. *Rankin*, 295 U. S. 123 at 131, 132.

Respectfully submitted,

W. Z. KERR,
*For Petitioner.*